No. 12211

In the United States Court of Appeals For the Ninth Circuit

EVERT L. HAGAN, doing business as EL REY CHEESE CO.,

Appellants,

vs.

CENTRAL AVENUE DAIRY, INC.,

Appellee.

Petition for Rehearing

EVERT L. HAGAN,
115 N. Eastern Avenue,
Los Angeles 22, Calif.
In Pro Per.

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Civil Procedure, is not in point. This was clearly pointed out by the decision in the case of Bank of Neosho vs. Colcord, 8 F. R. D. 621 (Western District of Missouri 1949) which held that Rule 13-G is conclusive as to the jurisdiction in interpleader, and is a correct statement of the law. The Eschger, Ghesquirer and Norman Case is nowhere in point. In this case, one claimant was a subject of England, and the other a citizen of France. Naturally, no general jurisdiction could be obtained over the French citizen unless personal service was made in England. There can be no parallel drawn to this case, and the case at Bar, for in the case at Bar, the claimants are both citizens of the United States, and Congress, by the National Interpleader Act, conferred general jurisdiction in interpleader actions upon the District Court and gave these courts the power to issue process throughout the United States. The jurisdiction conferred is general, because the Interpleader Act in no manner limits or restricts it. Where interpleader process was served upon the claimant, Central Avenue Dairy, outside the State of California, and within the United States, it was before the District Court for all purposes. Bank of Neosho vs. Colcord, supra. In the Eschger case there was absolutely no way of obtaining jurisdiction of any kind over the citizen of France in France by the English courts.

II.

THE CASE AT BAR CANNOT BE DISTINGUISHED FROM THE BANK OF NEOSHO VS. COLCORD CASE.

The opinion attempts to distinguish the *Bank of Neosho Case* from the case at bar by saying that in that case "claimant against whom a cross-complaint was asserted, had already appeared to claim the fund deposited by the stake-holder."

If Congress had not already, by the Interpleader Act conferred upon the District Court the power to issue its process outside of the state wherein it was sitting, the appearance of a claimant in interpleader for the purpose of claiming the fund, would have given the Court jurisdiction. But, where Congress has given the Court the power to issue its process outside of the state wherein it is sitting, it gave it jurisdiction and the ability to obtain the same, independently of an appearance or non-appearance of a non-resident claimant. The District Court in Los Angeles obtained jurisdiction over the defendant, for the purposes of the action, by the service of process by the United States Marshal in Arizona, the same as the District Court in Missouri obtained it by serving process upon the Oklahoma claimant, in the *Neosho case.* The jurisdiction thus obtained was general jurisdiction over the party and the subject matter of the action, to determine all matters which were germane to the subject matter of the interpleader action. We quote from the *Colcord case* (8 F. R. D. 621, L. C. 624):

"Claimants Waite assert, however, that being residents of the State of Illinois, they have entered a limited appearance in this interpleader action in which they have been made parties and are not subject to the jurisdiction of this court for any other purpose. An answer thereto is, that a Court in interpleader acquires general jurisdiction of the subject matter and of the parties. . . . (Underlining ours). The jurisdiction so acquired authorizes the adjudication of all issues arising between the parties, whether legal or equitable, and the process for the adjudication of such issues is made subject to the procedure set forth in the Rules of Civil Procedure.

"Claimants Waite further assert that they being citizens of the State of Illinois, and claimants Colcord and Hutchinson being residents of the State of Oklahoma, this court cannot acquire jurisdiction of the parties or subject matter involved in the cross claim. Holding, as we do, that the subject matter of the cross-claim here filed arises out of the same transaction or occurrence that is the subject matter of the original action, the subject matter of the cross-claim is auxiliary to the subject matter of the original action and on that premise the Court has jurisdiction thereof."

III.

THE COURT, AFTER OBTAINING JURISDICTION TO DETERMINE THE RIGHT OF PARTIES AS TO THE FUND DEPOSITED, HAD TO JUDICIALLY DETERMINE WHETHER OR NOT THERE HAS BEEN A BREACH OF THE CONTRACT OUT OF WHICH THE ESCROW AROSE, IN ORDER TO GRANT A DEFAULT JUDGMENT TO EVERT L. HAGAN.

The Court awarded judgment in favor of Evert L. Hagan, upon his claim of the funds, which claim arose solely from the breach of the contract out of which the escrow arose, Central Avenue Dairy. It was stated in both the opinion and the concurring opinion that there was nothing before the Court to determine, regarding the breach of the contract, that such determination was not necessary upon the interpleader action, and therefore, the damages for the breach could not be adjudicated upon the cross-claim, for which, the Court said, there was no independent jurisdiction. It must be remembered that the original interpleader arose by virtue of a suit brought by the Title Insurance and Trust Company, alleging that both Evert L. Hagan and the Central Avenue Dairy claimed the deposit. Evert L. Hagan answered, and claimed the fund solely by virtue of a breach of the contract, out of which the escrow arose, by the Central Avenue Dairy. That was the record that was before the District Court. The Central Avenue Dairy, though served, declined to deny the allegations and claims set

A general study of default judgments as to whether or not they constitute a judicial determination or *res* adjudicata, is to be found in 128 A. L. R. 472. In this study it is said:

> "It is a well settled general rule that a judgment by default may be the basis of a plea of *res adjudicata* or estoppel in a subsequent action involving the same matter, and that such a judgment is just as conclusive upon whatever is essential to support it as is a judgment rendered after answer and contest."

Cited in this annotation are many, many United States Supreme Court and Federal Circuit Court decisions, see 128 A. L. R., p. 474.

Petitioner submits that if the default judgment entered was one which necessarily had to be supported by the allegations that the Central Avenue Dairy had breached the contract, out of which the escrow agreement arose, that it is a judicial determination that the Central Avenue Dairy had breached the contract. Upon what other ground could it have given Hagan judgment? Germane to this finding was the question of damages which were suffered in addition by Evert L. Hagan, which resulted from the same breach of the same contract.

IV.

THIS COURT SHOULD EITHER GRANT A REHEARING OR SHOULD CERTIFY THE QUESTION HEREIN INVOLVED TO THE SUPREME COURT OF THE UNITED STATES FOR A SETTLEMENT OF IMPORTANT QUESTIONS OF LAW.

The real distinction between *Bank of Neosho vs. Colcord, supra,* and the decision of this Court in the case at Bar, is not one of different facts, but a difference of judicial philosophy in construing the National Interpleader Act and the Federal Rules of Civil Procedure. There is presented an important question of Federal jurisdiction, which should be determined by the highest Federal authority. Therefore, the question, if not re-heard by this Court, should be certified to the Supreme Court of the United States. Then, and only then, can this question be settled once and for all.

Respectfully submitted,

EVERT L. HAGAN,
In Pro Per.

CERTIFICATION TO PETITION FOR RE-HEARING.

EVERT L. HAGAN, acting in pro per, hereby certifies under Rule 25 of the U. S. Circuit Court of Appeals, for the Ninth Circuit, that he truly believes that this petition for re-hearing is well founded, and that it is not interposed for mere delay.

EVERT L. HAGAN.